NO. 48723-3-II

COURT OF APPEALS
DIVISION II OF THE STATE OF WASHINGTON

KITSAP COUNTY JUVENILE DETENTION OFFICERS' GUILD,

Respondent.

v.

KITSAP COUNTY,

Appellant,

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

APPELLANT'S RESPONSE BRIEF

TINA R. ROBINSON
Kitsap County Prosecuting Attorney
JACQUELYN M. AUFDERHEIDE, WSBA No. 17374
DEBORAH A. BOE, WSBA No. 39365
Deputy Prosecuting Attorneys
614 Division Street, MS-35A
Port Orchard, WA 98366-4676
(360) 337-4992

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Administrative Decisions

Statutes

APPENDICES

I. INTRODUCTION[1]

A finding that a party has refused to bargain in good faith is predicated on a finding of *bad* faith. Good faith bargaining does not demand perfection nor does it require that parties be entirely satisfied with the process; instead, good faith bargaining is judged by whether the party made a good faith effort to reach agreement. A decision involving a failure to bargain in good faith reflects a qualitative rather than a quantitative evaluation. In other words, bad faith bargaining is not meant to be the sum of minor complaints to equal a violation.

The Commission correctly concluded that Kitsap County (the Employer) did not act in bad faith by failing to send bargaining representatives to the table with sufficient authority to engage in meaningful bargaining and enter tentative agreements.

In concluding that the Employer did not engage in bad faith bargaining, the Public Employment Relations Commission (the Commission) rejected attempts to shoehorn a series of minor unrelated complaints into the category of "insufficient authority" to equal a violation. The Employer met at every scheduled session, made proposals and counterproposals, explained its proposals and its rationale for rejecting

[1] Kitsap County submits this brief in response to the Kitsap County Juvenile Detention Officers Guild's opening brief, pursuant to General Orders of Division II, 2010-1.

proposals, reached tentative agreements, and engaged in full and frank discussions. A party's disagreement with a proposal or dissatisfaction with the reasons expressed for the proposal is not and should not be the standard to determine bad faith bargaining.

The Superior Court and Kitsap County Juvenile Detention Officers Guild (Guild) erred in the standard of review applicable to decisions made by the Commission. The Commission correctly interpreted and applied the law of collective bargaining. The Commission's findings are supported by substantial evidence, and are not inconsistent with the Hearing Examiner's findings. Applying the great weight and substantial deference standard, the Court should affirm the Commission's decision that the Employer's negotiators had authority to enter tentative agreements and did so, listened and engaged in meaningful discussion, consulted with individuals not at the table to further develop proposals, and changed its positions to reach agreements with the Guild.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in failing to accord great weight to the Commission's determination that substantial evidence did not support the Hearing Examiner's conclusions and applications of law and concluding that the Employer committed an unfair labor practice in violation of RCW 41.56.140.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Whether the Guild has established the Commission engaged in an unlawful decision making process, erroneously interpreted or applied the law, that its order is not supported by the deferential substantial evidence standard, or that its order is arbitrary or capricious, when, after examining the totality of the circumstances, the Commission concluded the Employer did not act in bad faith by failing to send representatives to the table with sufficient authority to engage in meaningful bargaining.

IV. STATEMENT OF THE CASE

A. Procedural Statement of the Case

The Guild filed an unfair labor practice complaint against the Employer in March 2013.[2] A hearing was held in May 2014,[3] and the Hearing Examiner issued Findings of Fact, Conclusions of Law, and Order on October 6, 2014.[4] The hearing officer concluded:

> As described in Findings of Fact 4 through 26, Kitsap County breached its good faith bargaining obligations by not sending bargaining representatives to the table with sufficient authority to engage in meaningful bargaining and, therefore, committed an unfair labor practice in violation of RCW 41.56.140(4) and (1).[5]

---

[2] AR 816-828.
[3] AR 214-425 (TR).
[4] AR 132-162.
[5] Id.

The Employer timely appealed the Hearing Examiner's decision.[6] The Employer's stated grounds for appeal, appearing in the Notice of Appeal, read:

> **Findings of Fact in Error.**
> Findings of Fact Nos. 10-26. The hearing examiner erred in these findings of fact to the extent that they are not a complete description of the totality of the circumstances and that they are not relevant to whether the employer's representative had sufficient authority to engage in meaningful bargaining.
>
> **Conclusion of Law in Error.**
> Conclusion of Law No. 2. The hearing examiner erred in concluding that Kitsap County breached its good faith bargaining obligations by not sending bargaining representatives to the table with sufficient authority to engage in meaningful bargaining and, therefore, committed an unfair labor practice in violation of RCW 41.56.140(1) and (4).
>
> **Order in Error.**
> Order No. 1(a). The hearing examiner erred in ordering Kitsap County to cease and desist from failing or refusing to have representatives at the bargaining table with sufficient authority to engage in meaningful bargaining over an initial collective bargaining agreement.[7]

The Commission ruled on the Employer's appeal issuing a decision on June 2, 2015.[8, 9] The Commission replaced a number of the Hearing Examiner's findings of fact and the Hearing Examiner's conclusion that the Employer breached its good faith bargaining

---

[6] AR 97-131.
[7] Id. at 97-98.
[8] AR 1-25.
[9] The Employer filed an untimely appeal brief with PERC, which was rejected. AR 71-73. However, the Employer's post-hearing brief to the hearing examiner was part of the record. AR 193-213.

obligations.[10]

The Guild appealed the Commission's decision to the Superior Court by filing a petition for review.[11] On April 1, 2016, the superior court granted the Guild's petition for review, holding that the Commission erroneously interpreted the law. The superior court's order reads in pertinent part:

> Under the terms of RCW 34.05.570, this Court is empowered to set aside a ruling by PERC that involves error of law, and this court concludes the Commission committed such an error herein when it reversed the Hearing Examiner Conclusion of Law and Order.
>
> IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Commission's Conclusions of Law and Order in Decision 12163-A (PECB, 2015) be reversed.[12]

In considering the language for its Order Granting Petitioner's Petition for Review, the Superior Court expressly rejected the Guild's language that the Commission's decision should be vacated in its entirety.[13] The Court reversed only the Commission's conclusions of law and order, leaving intact the Commission's findings of fact.[14]

The Employer filed a timely notice of appeal with this Court on

---

[10]AR 20-25.
[11]AR 58-70.
[12]CP 088.
[13] RP 9 ("So the issue that I'm presented with is whether or not I use the language that was proposed by the Guild, the prevailing party, which says that the decision is vacated and the Hearing Examiner's decision is reinstated. I don't think I said that and that wasn't the way I intended to word that").
[14] Id. at 11-12.

April 11, 2016. A perfection notice was issued by the Court Clerk on April 20, 2016.

B. Substantive Statement of the Case

The employees at issue in this matter, juvenile detention officers and food service workers, work in the Kitsap County Juvenile and Family Court Services Department. The employees have dual employers. Kitsap County Superior Court is the employer for nonwage-related matters and the Board of County Commissioners is the employer for wage-related matters.[15]

The employees elected to change their bargaining representative and on July 5, 2012, the Kitsap Juvenile Detention Officers Guild was certified as the exclusive bargaining representative of the employees.[16] The parties did not meet to begin bargaining for their initial collective bargaining agreement until September 11, 2012.[17]

The Employer's bargaining team consisted of Fernando Conill, Michael Merringer, and William Truemper.[18] The Guild's bargaining team consisted of its President (Pepe Pedesclaux) and Vice-President

---

[15]AR 253, 402, 427 (EX 1, p. 2; TR 40:19; TR 189:2-5; see also RCW 41.56.030(12)).
[16]AR 1-25 (Kitsap County, Decision 11361-A (PECB, 2012)).
[17]AR 236, 239-40 (TR 23:21-24; TR 26:11-12; TR 27:22-24).
[18]AR 294 (TR 81:8-10; EX 17).

(Jack Kissler) and the Guild's attorney Chris Casillas.[19] Mr. Merringer and Mr. Truemper, the Employer's representatives for nonwage related matters, were unable to attend the first meeting, so discussions on September 11 were limited to the Employer's economic proposals.[20] The Guild's executive vice president, Jack Kissler, testified that at that meeting the Employer's representative for wage related matters, Fernando Conill, introduced the Employer's main economic proposals, and spent time going over and explaining the proposals so that the Guild understood them.[21] The Guild presented a proposal for ground rules.[22]

The second bargaining session occurred on September 25, 2012.[23] The Employer's first full contract proposal was handed out at that meeting.[24] Discussions on that day also included training of on-call employees, shift bidding, and using juvenile detention officers to drive the van for KATS youth.[25]

The third bargaining session occurred on October 9. The Employer submitted, again, its opening proposal with minor changes.[26]

---

[19]AR 237 (TR 24:17-18).
[20]AR 292, 615 (TR 79:23-80:15; EX 17, p. 1).
[21]AR 241, 293, 615-629 (EX 17, pp. 1-14; TR 28:21-29:1; TR 80:18-81:2).
[22]AR 243-44, 430-31 (TR 30:1-7; TR 31:8-13; EX 2).
[23]AR 294 (TR 81:3-6).
[24]AR 294-95, 630-65 (TR 81:22-82:3; EX 18).
[25]AR 295, 299 (TR 82:22-83:6; TR 86:3-11).
[26]AR 254, 550, 552, 559 (TR 41:10-22; EX 6 (see pp. 2, 4, and 10).

The Guild presented a partial opening contract proposal at this meeting.[27] Among other things, the parties again discussed training of on-call employees, bidding for vacant shifts, and transport of youth.[28]

On November 1, the Employer sent a memorandum to the Guild containing a revised health care proposal, offering to maintain employee contributions for medical insurance at 2012 levels.[29]

At the bargaining session that took place on November 6, in response to concerns expressed earlier by the Guild, the Employer modified several of its economic proposals.[30] At that session the Guild submitted a second redline proposal, and the parties went through each of their proposals.[31]

Another bargaining session occurred on November 20.[32] At that session Fernando Conill delivered a memorandum responding to the Guild's concerns about training of on-call employees and he and Mr. Merringer explained the Employer's position.[33] The Employer also issued its counterproposal to the Guild's proposed ground rules.[34] The Employer

---

[27]AR 248, 436-484 (TR 35:17-36:13; EX 4).
[28]AR 300, 360 (TR 87:12-22; TR 147:14-22).
[29]AR 306, 666-69 (EX 19; TR 93:6-19).
[30]AR 307, 362 (EX 20; TR 94:6-96-2; TR 148:4-6).
[31]AR 250, 309, 485-548 (EX 5; TR 37:8-38:14; TR 96:9-15).
[32]AR 371 (TR 148:17-19).
[33]AR 310 (TR 97:5-98:3).
[34]AR 363, 432-35 (EX 3; TR 150:22-6).

understood that the Guild intended to respond to the Employer's ground rules counterproposal on February 26.[35]

At the bargaining session on December 4, 2012, the parties' initiated discussions concerning their respective proposals for resolving grievances.[36] The nondiscrimination clause was also discussed.[37] At this meeting the Guild raised concerns about the Employer's overtime proposal.[38]

Discussions concerning the grievance procedure also took place at the bargaining session on December 17, when Mr. Merringer offered to raise the Guild's concerns about the Employer's grievance proposal at a meeting of the Board of Superior Court judges scheduled to occur the next day.[39]

A bargaining session took place on January 25, 2013, and a lengthy discussion concerning the parties' grievance proposals took place.[40] At that session the Guild's legal representative, Chris Casillas, questioned the Employer's bargaining team about what the word "binding" meant, and whether it would preclude the Guild from filing a

---

[35]AR 364 (TR 151:13-18).
[36]AR 361-64 (TR 148:22-23; TR 151:19-153:3).
[37]AR 365-66 (TR 152:19-153:17).
[38]AR 312, 315 (TR 99:14-100:12; TR 102:5-22).
[39]AR 364-66 (TR 153:18-155:12).
[40]AR 270, 368 (TR 57:24-58:1; TR 155:14-18).

lawsuit.[41] Mr. Merringer explained that the question was legal in nature and if Mr. Casillas would articulate the question in writing, Mr. Merringer would seek a legal opinion from the Employer's legal counsel.[42]

The next bargaining session occurred on February 26, 2013. Mr. Merringer explained the Employer's reasoning for its grievance proposal and answered the Guild's questions about the proposal.[43] As will be explained in more detail below, this meeting was effectively terminated early when the Guild refused to move to another topic on the agenda, which was a common sense course of action considering the tensions on both sides.

When the Guild filed the complaint at issue in this matter, March 11, 2013, the parties had not reached agreement on an initial collective bargaining agreement.

V. ARGUMENT

The only issue in this case is whether the Employer violated RCW 41.56.140 by failing to send a representative to the bargaining table with sufficient authority and knowledge to engage in meaningful bargaining.[44] The Guild attempts to shoehorn every allegation of bad faith bargaining into its contention that the Employer representatives lacked authority to

---

[41]AR 368-69 (TR 155:9-156:9).
[42]Id.; AR 271 (TR 58:4-8).
[43]AR 373-74 (TR 160:12-161:25).
[44] The Guild did not appeal any aspects of the Hearing Examiner's decision.

meaningfully negotiate. Most of the evidence presented to the Hearing Examiner, however, has little to do with bargaining authority and mostly to do with the Guild's disagreement with the Employer's proposals and displeasure with the Employer's explanations for those proposals.

A. Standard for Judicial Review

The legislature "empowered and directed [the Commission] to prevent any unfair labor practice and to issue appropriate remedial orders."[45] This Court recently reiterated the standard for judicial review of Commission decisions in unfair labor practice cases:

> We review a Commission decision concerning a violation of RCW 41.56.140 under the standards prescribed by the APA. RCW 41.56.165; *Pub. Emps. Relations Comm'n v. City of Vancouver*, 107 Wash.App. 694, 702, 33 P.3d 74 (2001). We review any questions of law, such as the Commission's interpretation of a statute or judicial precedent, de novo. *City of Vancouver*, 107 Wash.App. at 703, 33 P.3d 74. We may substitute our interpretation of the law for the Commission's, although we give the Commission's interpretation of chapter 41.56 RCW great weight and substantial deference. *City of Vancouver*, 107 Wash.App. at 703, 33 P.3d 74. We review the Commission's factual findings "for substantial evidence in light of the whole record, i.e., evidence sufficient to persuade a fair-minded person of their truth." *City of Vancouver*, 107 Wash.App. at 703, 33 P.3d 74. When performing this review, we may "not substitute [our] judgment for that of the agency regarding witness credibility or the weight of the evidence." *Thomas v. Emp't Sec. Dep't*, 176 Wash.App. 809, 813, 309 P.3d 761 (2013).[46]

---

[45]RCW 41.56.160(1).

[46]*City of Vancouver v. State Public Employment Relations Com'n,* 180 Wn.App. 333, 347, 325 P.3d 213 (2014).

When considering contradictory orders of the Commission and the Hearing Examiner, the standard of review remains the same.[47] Thus, the deference accorded fact finding runs in favor of the Commission, but the Hearing Examiner's findings as part of the record are weighed along with other opposing evidence, against the evidence supporting the Commission's decision.[48] "Because PERC is entitled to substitute its findings for those of the hearing examiner, it is the PERC findings that are relevant on appeal."[49] The burden of showing that an agency's order is invalid for one of the reasons contained in RCW 34.05.570 is on the party challenging the agency's order – the Guild in this case.[50]

Thus, when reviewing questions of law, the Commission's interpretation of collective bargaining laws is entitled to great weight and substantial deference. As to questions of fact, the Commission is entitled to substitute its findings for those of the Hearing Examiner, exercising all decision-making power as if it had presided over the hearing. If the

---

[47] *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 459, 938 P.2d 827, 832–33 (1997).
[48] *Id., citing International Ass'n of Firefighters, Local No. 469 v. PERC*, 38 Wn.App. 572, 576, 686 P.2d 1122 (1984) (*citing NLRB v. Brooks Cameras, Inc.*, 691 F.2d 912, 915 (9th Cir.1982)).
[49] *Yakima Police Patrolmen's Ass'n v. City of Yakima*, 153 Wn. App. 541, 552, 222 P.3d 1217, 1224 (2009); *citing City of Federal Way v. Public Employment Relations Comm'n*, 93 Wn.App. 509, 511–12, 970 P.2d 752 (1998).
[50] *Yakima Police Patrolmen's Ass'n* at 553.

Commission's factual findings are challenged, it is the Commission's findings that are relevant on appeal—not the findings of the Hearing Examiner or the Superior Court. The Commission's factual findings are reviewed for substantial evidence in light of the whole record, and the substantial evidence standard is deferential—a reviewing court is not permitted to substitute its view of the facts for that of the agency if substantial evidence is found. Here, the Superior Court did not substitute any findings but vacated the Commission's conclusions of law.

The Guild argues that because, in its view, the Commission made an error of law, it is not due deference. First, the Guild's argument is circular because a court cannot first decide whether there is an error of law and *then* determine whether there should be deference for that decision. Obviously, the court starts with a deferential standard, then determines if an error was made under that standard. Second, the Guild confuses the doctrine of primary jurisdiction with that of deference to an administrative agency's decision. Consequently, the Guild's reliance on *Northshore School District* is misplaced.[51] In *Northshore,* one of the issues was whether the court had primary jurisdiction to decide an unfair labor

[51]*State ex. Rel. Graham v. Northshore Sch. Dist.,* 99 Wn.2d 232, 662 P.2d 38(1983).

practice or whether it must defer jurisdiction to the Commission.[52] The Washington Supreme Court concluded that the trial court did not abuse its discretion in declining to apply primary jurisdiction, i.e., retaining jurisdiction of the matter.[53] Here, the Court is reviewing the Commission's decision, therefore, there is no issue before this court of primary jurisdiction making *Northshore* inapplicable to the present case.

B. The Commission Properly Reviewed the Hearing Examiner Findings under the Substantial Evidence Standard, and Reviewed the Legal Conclusions De Novo.

The Guild contends that the Commission did not follow its own rules because it conducted a de novo review of the Hearing Examiner's decision which resulted in an arbitrary and capricious decision.[54] The Commission is tasked with reviewing the Hearing Examiner's legal conclusions de novo, just as this Court is tasked with reviewing the Commission's legal conclusions de novo. The Commission properly set forth the standard for its review of a Hearing Examiner decision:

---

[52] *Id.* at 235.
[53] *Id.* at 243.
[54] The Guild also argues that the Commission cannot overturn the Hearing Examiner without the benefit of County's appellate brief which was not considered. However, the Commission properly had before it the County's Notice of Appeal as well as the briefing to the Hearing Examiner.

> The Commission reviews conclusions and applications of laws, as well as interpretations of statutes, de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the examiner's conclusions of law. *C-Tran (Amalgamated Transit Union, Local 757),* Decision 7087-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Id.* The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County,* Decision 7007-A (PECB, 2000).[55]

The Commission must examine the record to determine if there is substantial evidence to support the findings, whether the findings support the legal conclusions, and whether the conclusions are supported by law. The Court examines the Commission's decision to determine whether it violates RCW 34.05.570(3).

The Guild argues that the Commission improperly conducted a de novo review. But a comparison of the vacated Hearing Examiner findings with the findings added by the Commission show that the Commission emphasized different facts and found certain evidence irrelevant, but did not find opposite evidence. For example, the Hearing Examiner often quotes the Guild President's testimony regarding his feelings about bargaining.[56] Whereas, the Commission in its substituted Finding of Facts

---

[55]AR 6 (*Kitsap County,* Decision 12163-A, p.6 (PECB, 2014)).
[56] See the Hearing Examiner's Findings of Facts 10, 11, 12, 24 where Mr. Kissler's verbatim testimony was included in a finding. Appendix 1.

properly makes a finding regarding the events at the bargaining table without including verbatim testimony. There is little substantive difference in the Hearing Examiner's Findings and the Commission's Findings.[57]

The Appendix contains a comparison of the Hearing Examiner and Commission's substituted findings. The comparison shows that the Commission's findings are not opposite or inconsistent with the Hearing Examiner's findings. Rather, they either add other relevant facts from the record[58], or the Commission leaves out facts in the findings it deemed not relevant to the issue.[59] Thus, the Commission did afford appropriate weight to the Hearing Examiner findings of fact after a review of the record when it determined that there was not substantial evidence to support the legal conclusion that the County bargained in bad faith.

In addition, the Hearing Examiner did not make any credibility findings. However, the Commission did make a credibility determination and noted in footnote 11 that the examiner did not enter a credibility determination. This determination is based on the quality of the testimony

---

[58] The Commission added Findings of Fact 11 and 12 which are brief descriptions of two bargaining sessions where the parties exchanged proposals and made tentative agreements.

[59] The only Finding that the Commission did not include is the Hearing Examiner's Finding of Fact 26 which describes an email sent by Merringer to Casillas expressing his frustration that Casillas takes "advantage of being the only lawyer in the room."

available in the record."[60,61] In that credibility determination, the Commission determined that the Employer's explanation was more detailed and reasonable than the Guild's explanation of why the Employer needed to consult about a bargaining proposal. The Hearing Examiner did not make credibility findings, so the Commission's single finding of credibility is proper and does not show a lack of appropriate consideration of the findings made by the Hearing Examiner.

The Guild also contends that the Commission's findings are not supported by substantial evidence. First, as explained above, the Commission did review the record to determine if there was substantial evidence and did not materially change any evidence in its substituted findings. The critical question before the Commission was whether there was substantial evidence to support the legal conclusions. The evidence in the record did not change upon review, nor did the findings substantially change, only the legal conclusion did. The Commission properly reviewed the legal conclusion de novo.[62]

---

[60]AR 10 (FN 11).

[61] Also, compare the Hearing Examiner's Finding of Fact 10 with the substituted Findings by the Commission, 10 and 14. The Hearing Examiner's Finding of Fact 10 is primarily quotes of Kissler and Merringer's testimony, whereas the Commission makes a credibility finding (Finding of Fact 14) that Merringer's testimony is more credible than Kissler's. Appendix 1.

[62]*C-Tran (Amalgamated Transit Union, Local 757),* Decision 7087-B (PECB, 2002).

The Guild can present no reasonable argument that the Commission's decision is legally erroneous, unsupported by the evidence, or arbitrary or capricious. The Commission issued a detailed 23 page decision explaining its reasoning for reversing the legal conclusion of the Hearing Examiner. The Commission explains throughout its decision why the Employer's actions do not amount to bad faith bargaining because the Employer's representative lacked sufficient authority to bargain. The crux of the Guild's complaint was that the Employer did not immediately agree to the Guild's proposals at the bargaining table so the Employer's representative lacked sufficient authority to bargain.

The Hearing Examiner found that the Employer's actions—obtaining input from decision makers, seeking clarification about actions unknown to the Employer's representatives, determining if the Guild's proposals were consistent with the Employer's policies, and ensuring it could relate the reasons for the Employer's stance on proposals, were evidence of lack of sufficient authority and therefore in bad faith. The Commission looked at the same evidence under the totality of the circumstances and concluded the Employer had not engaged in bad faith bargaining.

The Commission properly adhered to the standard of review by reviewing the findings to determine if they are based on substantial

evidence. The Commission did not materially change the evidence or factual findings. The Commission also properly conducted a de novo review of the legal conclusions when it determined that there was not substantial evidence to support the Hearing Examiner's legal conclusions.

C. The Commission's Interpretation of Collective Bargaining Statutes is Afforded Substantial Weight and Great Deference.

The issue before the Commission was whether the Employer engaged in bad faith bargaining by failing to send bargaining representatives to the table with sufficient authority to engage in meaningful bargaining. The Commission carefully considered the delicate balance required in collective bargaining, explaining:

> Thus, a balance must be struck between the obligation of the parties to bargain in good faith and the requirement that parties not be forced to make concessions. *City of Snohomish,* Decision 1661-A. This fine line reflects the natural tension between the obligation to bargain in good faith and the statutory mandate that there is no requirement that concessions be made or an agreement be reached. *Walla Walla County,* Decision 2932-A(PECB, 1988). Distinguishing between good faith and bad faith bargaining can be difficult in close cases. *Mansfield School District,* Decision 4552-B (EDUC, 1995).[63]

The Commission has a long precedent of deciding these sorts of cases and relied on that in its decision here. Because of the Commission's unique expertise and task by the Legislature to enforce PECBA, the

---

[63] AR 7.

Commission's decision should be afforded substantial weight and great deference. The superior court erred in not doing so.

D. The Commission Properly Concluded that the Employer Representatives Did Not Lack Authority to Meaningfully Negotiate.

Bargaining representatives must have sufficient authority to engage in meaningful negotiations. The Hearing Examiner acknowledged that individually, the actions complained of by the Guild do not support a finding of insufficient authority.[64] Good faith bargaining does not demand perfection nor does it require that parties be entirely satisfied with the process; instead, good faith bargaining is judged by whether the party made a good faith effort to reach agreement. All of the acts complained of as bad faith bargaining were in fact a good faith attempt to collectively bargain and reach agreement. The Guild's disagreement with the Employer's proposals and displeasure with the Employer's reasons for particular proposals is not and should not be the standard to determine bad faith bargaining.

None of the interactions in bargaining are disputed by the parties. In fact, both the Hearing Examiner and the Commission agree on the facts underlying the bargaining sessions. Subsequently, the argument below relies on facts not in dispute by either party or the Hearing Examiner and

[64] AR 145.

the Commission. The crux of this case is whether those events add up to bad faith bargaining because the Employer failed to send representatives to the table with sufficient authority. The undisputed facts show that the Employer had sufficient authority to meaningfully bargain with the Guild and did so on 10 separate occasions. Therefore, the Commission had substantial evidence to conclude that the County bargained in good faith and sent representatives to the table with sufficient authority.

1. The Employer's representatives did not unduly delay bargaining.

The Commission addressed the Guild's complaint that the bargaining representatives' lack of authority caused undue delay in the bargaining process. The Guild complained that the delay in getting back to them on their proposals or in explaining the Employer's rationale was bad faith bargaining. But, the Commission considered the totality of the circumstances or "context of all of the negotiations" and considered the following: (1) the time between bargaining sessions necessarily means that there will be "delay"; (2) the Employer provided rationales and proposals at the meetings, even if there was six weeks between meetings; (3) although the parties exchanged emails between sessions, the face to face

meetings "were best suited to negotiations;" and (4) the parties met 10 times and did reach some agreements.[65]

After considering the entire context of negotiations, the Commission did not find any undue delay by the Employer, but recognized that the Guild had a new representative that presented a new dynamic and consequently, bargaining was taking time. Critically, the Commission concluded that the delay was not due to any lack of authority of the Employer representatives. *Id.*

2. The Employer's need to check with stakeholders not at the table is not bad faith bargaining.

Any delay caused by representatives checking with decision makers or others is not per se bad faith. The Commission recognized that representatives are given authority by a governing body, in this case the Superior Court judges, for non-wage matters and the Board of Commissioners for wage related matters. Typically, each party has been given authority within parameters for proposals and negotiations. In fact, it would be bad faith bargaining to promise something a party knows it has no authority to promise. The Commission summed it up: "In collective bargaining it is not uncommon for a party to need to review a proposal and be unable to immediately respond, enter agreement, or change its

[65]AR 17.

proposal. Stakeholders may need to be consulted for change to be effected."[66]

For example, the Guild proposed language for nondiscrimination, and although the County had no real issue of concern about the Guild's proposal, Mr. Conill explained that the County was in the process of revising its non-discrimination policy and wanted to review the revisions before committing to the Guild's language.[67] At the time that Mr. Conill explained this to the Guild, there was no complaint or objection from the Guild.[68] Nor did the Guild complain that the proper person to bargain the discrimination procedure was not at the table.[69] At the hearing, the Guild acknowledged that Mr. Conill's desire to consider the Guild's nondiscrimination proposal did not delay resolution of the contract, as numerous items were still open.[70] That Mr. Conill wanted to compare the Guild's nondiscrimination proposal with the revisions being made to the County-wide nondiscrimination policy is not evidence that he lacked bargaining authority over the nondiscrimination proposal.

If this Court were to hold that it was bad faith bargaining every time a party needed to consult with a stakeholder, then an Employer, or

---

[66]AR 18.
[67]AR 263, 365-66 (TR 50:21-18; TR 152:22-153:3).
[68]AR 366 (TR 153:4-17).
[69]AR 366 (TR 153:7-17).
[70]AR 320-22 (TR 107:25-109:9).

the Guild, would be in an impossible position. The party would either have to agree to a proposal which is outside its given authority and which may be walked back later on or risk an unfair labor practice for consulting with the governing authority. The Guild also did not immediately agree to the County's proposals – that is expected in negotiations and is not evidence that the Guild representative lacked sufficient authority to bargain.

3. The Employer's representatives did not lack knowledge to the extent that it resulted in bad faith bargaining.

The Guild's third contention was that the representatives lacked sufficient knowledge to meaningfully bargain because the Labor Relations Manager Fernando Conill was unaware of a BOCC resolution on overtime for non-represented employees passed a few days before the bargaining session. The Commission concluded that "[w]hile troubling, a lack of knowledge about an action taken by the governing body does not mean the employer's negotiators lacked authority to bargain." *Id.* The evidence establishes that Mr. Conill did look into the resolution for non-represented employees and subsequently changed the Employer's proposal.[71]

The Employer's September 25 opening overtime proposal eliminated all "contractual" overtime; i.e., the proposal limited overtime compensation to hours worked in excess of 40 hours worked in a work

[71]AR 312-16 (TR 99-103).

week as mandated by the Fair Labor Standards Act (FLSA).[72] At the December 4 bargaining session, the Guild presented a copy of a resolution adopted by the Board of Commissioners on November 26, 2012, amending the Kitsap County Personnel Manual.[73] Under the terms of the revised Personnel Manual which applied only to non-represented employees, overtime compensation for hours worked in excess of eight hours in a day was retained, but overtime compensation for paid leave taken was eliminated. In other words, overtime compensation was limited to hours actually worked in excess of eight hours in a day or 40 hours in a work week.[74]

The Guild questioned the fairness of the Employer's proposal to the Guild to eliminate all contractual overtime for juvenile detention employees while retaining some contractual overtime for non-represented employees. Mr. Conill was unaware of the resolution, but explained that the County's proposal to eliminate contractual overtime had been County-wide.[75] Mr. Conill listened to the Guild's concerns about the proposal[76], and two sessions later presented a revised overtime proposal to the

---

[72]AR 616 (EX 17, p. 2).
[73]AR 312, (EX 7; TR 99:14-19).
[74]AR 588-89 (EX. 7, pp. 1-2 (Section G).
[75]AR 313-15, 362 (TR 100:6-12; TR 101:18-102:9; TR 149:2-9).
[76]AR 305, 313 (TR 92:15-22; TR 100:6-12).

Guild.[77] The revised proposal was similar to the terms contained in the revised Personnel Manual.[78]

The Employer is not obligated to pay the same compensation to represented and non-represented employees. Furthermore, that the Employer's bargaining team was unaware of the resolution revising the overtime provisions of the Personnel Manual is not evidence that he lacked authority to bargain overtime with the Guild.

If it were bad faith for bargaining representatives to admit that they did not know something, then there would never be a full and frank discussion of the issues. The parties would not be frank with each other and bargaining would become a game of gotcha. In this case, Mr. Conill honestly admitted he did not know of the recent resolution, then he not only looked into the resolution brought to his attention, but changed the Employer's proposal accordingly. Far from bad faith bargaining, this is an example of good faith bargaining.

4. On numerous occasions, the Employer's representatives explained their rationale for not agreeing with the Guild's grievance proposal.

The Guild also contends that the Employer representatives failed to explain their rationale for not agreeing to the Guild's grievance proposal.

---

[77]AR 263, 313, 316 (TR 50:2-6; TR 100:1-5; TR 103:1-10).
[78]AR 316 (TR 103:1-10).

As the Commission found, the Employer representatives explained their rationale many times, and even the Guild President testified that he understood the Employer's rationale. The parties initiated their discussions concerning the process for resolving grievances at the December 4 bargaining session. The parties' proposals differed substantially. The Employer proposed language effectively the same as language that had been in previous collective bargaining agreements covering the juvenile detention and food service workers.[79] The Guild's proposed language would eliminate the two-step, wage and non-wage process whereby grievances on non-wage related matters would end at Step 2 with the decision of the superior court judge.[80]

The Guild acknowledges that at the December 4 bargaining session, the Employer's representatives listened to the Guild's concerns about the process for resolving non-wage grievances, and the Employer's representatives offered to consider and respond to the Guild's proposal.[81] After the session, Mr. Merringer requested a legal analysis concerning grievance arbitration and consulted with the Superior Court presiding judge, who indicated that she wanted the matter to be considered by the

---

[79] AR 252, 255, 642-44 (TR 39:18-22; TR 42:17-19; EX 18, pp. 12-14; EX 23, pp. 11-13).
[80] AR 252, 364-65, 500-03 (TR 39:25-40:5; TR 151:25-152:3; EX 5, pp. 15-18).
[81] AR 266-67 (TR 53:7-9; TR 54:1-14).

full Board of Superior Court judges at meeting that was to take place on December 18.[82]

At the next bargaining session on December 17, the grievance process was again discussed.[83] In that session, Mr. Merringer informed the Guild that he was scheduled to meet with the Superior Court judges the next day to brief them on the grievance procedures, and the Guild was "fairly amenable to getting some type of response back from the judges."[84]

At the January 25 bargaining session, discussions concerning the grievance procedure focused primarily on the Guild's questions about what the word "binding" meant.[85] Because Mr. Merringer believed that Chris Casillas was asking for a legal interpretation of the word "binding," he asked Mr. Casillas to put his question in writing to submit to the Employer's legal representative.[86] On February 7, about two weeks after the January 25 bargaining session and Mr. Merringer's request, Mr. Casillas sent his question in an email to Mr. Merringer.[87] The Employer sent answers to Mr. Casillas' legal questions the next day.[88]

---

[82]AR 367 (TR 154:1-8).
[83]AR 366 (TR 153:21-23).
[84]AR 367 (TR 154:12-18).
[85]AR 368 (TR 155:14-156:21).
[86]AR 370 (TR 157:8-13).
[87]AR 590 (EX 8).
[88]AR 370, 591-94 (EX 9; TR 157:1-13).

Mr. Casillas was not satisfied with the County's answers to his legal questions, contending that they were not responsive.[89] Mr. Merringer responded to Mr. Casillas objections, offering to further explain the Employer's proposals.[90]

The parties' next bargaining session on February 26 opened with considerable tension.[91] Despite the Employer's ongoing efforts to obtain relief from laws and regulations for Criminal Justice Training for on-call juvenile detention employees, the Guild filed an unfair labor practice complaint against the Employer.[92] The parties' had established an agenda for the meeting on February 26, which was scheduled from 9:00 a.m. to noon.[93] After discussing the on-call training issue, the parties resumed their negotiations on the grievance procedures.[94] Further discussion around the word "binding" took place, and then the discussion turned to the County's explanation of why it wanted to retain the grievance process that was already in place.[95] Mr. Merringer had met with the presiding judge and the board of Superior Court judges, who had reviewed the legal

---

[89] AR 370, 595-96 (TR 157:14-23; EX 10).
[90] AR 371-72, 597-99, 606-10 (EX 11; EX 14; TR 158:1-17; TR 158:24-159:24).
[91] AR 373, 283 (TR 160:14; TR 70:1-8).
[92] AR 283, 297, 310, 373-74, 671 (TR 160:15-161:2; TR 84:23-4; EX 21; TR 97:5-13; TR 70:3-13).
[93] AR 228-236, 280, 604-05 (TR 67:16-22; TR 15-23; EX 13).
[94] AR 283 (TR 70:13-25).
[95] AR 284-85 (TR 71:1-72:4).

analysis that had been provided.[96] At the February 26 bargaining session, Mr. Merringer conveyed the judges' reasons for wanting to retain the existing grievance procedure.[97]

During the February 26 session, the Employer offered to consider a change proposed by the Guild at Section 10.2, Step 2, to add language something to the effect of "The decision rendered at the Superior Court level shall be the last step of the grievance process."[98] When Mr. Merringer prepared notes from his meeting with the Superior Court Judges, and read from those notes, the Guild complained that he was reading from a script. Again, there is no bad faith bargaining because the Employer refused to change its mind and agree to the Guild's proposal. Neither is there bad faith because the representative read from his notes to explain his rationale. Mr. Merringer's actions were to help the Guild understand the Employer's rationale, not to frustrate or delay bargaining.

The Guild also alleges that the Employer's representatives could not explain what "binding" meant to the Guild's satisfaction. This is specious because the Guild representative, Mr. Casillas was the only lawyer at the table and probably knew better than anyone else what

---

[96] AR 374 (TR 161:3-7).
[97] AR 374, 778-79 (TR 161:10-25; EX 29).
[98] AR 771-74, 776 (EX 27 (3rd paragraph); EX 28, p. 2).

"binding" means. Even the Guild President testified that he understood that the word "binding" meant that there were no more steps in the grievance process.[99] The Guild's disagreement with a proposal, or its attorney's feigned lack of understanding of the meaning of 'binding," does not convert the Employer's explanations into bad faith bargaining.

The Commission appropriately determined that "there is no evidence that the employer was attempting to frustrate the negotiation process by maintaining a firm position on the grievance procedure."[100] Nor does the Employer's firm stance on a position evidence that the representative lacked sufficient authority to bargain.

5. The Employer's termination of a bargaining session was not in bad faith because the Employer is not required to engage in fruitless marathon discussions.

"The duty to bargain does not require parties to engage in fruitless give and take marathon discussions at the expense of statements and support of respective positions. But, there has to be good faith discussions and explanations of their proposals even where irreconcilable differences in the parties' positions are apparent."[101]

---

[99] AR 302-03 (TR 89:1-90:19).
[100] AR 18.
[101] *Washington State Department Of Transportation, Ferries Division*, Decision No. 588 (MEC, 2010).

The Guild's final contention of bad faith was because the Employer representatives terminated a bargaining session early. After an hour of discussing the grievance procedure on February 26, 2013, (and this after discussing the grievance proposal at three prior sessions) the Employer asked for a break. After the break, the Employer asked to move on to another topic. When the Guild refused, the Employer terminated the session.[102]

There is no dispute that the parties had established an agenda with several topics for three-hour bargaining session on February 26.[103] After discussing training for on-calls, the parties moved to the topic of grievance procedures.[104]

After discussing the grievance procedure for about an hour, answering the same questions from Mr. Casillas at least three different times, Mr. Merringer requested a break from the discussing grievance procedures. He explained that he was willing to discuss any other topic on the agenda, but if the Guild refused to move on to a subject other than grievance procedures he was done for the session.[105] Mr. Merringer's request to move to another topic or he was done for the day was neither a unilateral dictate of the topics for the session, nor a "cancelling" of the

[102] AR 22 (*Kitsap County,* Finding of Fact 29).
[103] AR 280, 282, 363 (TR 67:18-22; TR 69:17-23; TR 150:6-14).
[104] AR 283 (TR 70:1-15).
[105] AR 476 (TR 163:12-16).

session. It was obvious to everyone at the table that tensions were high and negotiations on the grievance procedure on that day were going nowhere.

Mr. Casillas refused to move to another topic on the agenda. In light of tensions and Mr. Merringer's willingness to continue bargaining on another subject, it was arguably bad faith on the part of the Guild to refuse to move to another topic on the agenda.

Obviously the Guild did not like the Employer's position and explanation for refusing to agree to the Guild's proposed grievance procedure, but no amount of explanation would satisfy the Guild at that point. Moving on to another agenda item is reasonable in that circumstance. The Guild was unreasonable in refusing to move on. But in any case, the Employer was willing to continue bargaining "but [] it would not continue to engage in a discussion that was going nowhere."[106] Moreover, the Employer's termination of the bargaining session does not indicate the Employer representatives lacked authority to meaningfully bargain.

//

/

---

[106]AR 17.

E. The Totality of the Circumstances Do Not Support a Finding of Bad Faith Bargaining.

In determining whether an unfair labor practice has occurred, the totality of circumstances must be analyzed.[107] The evidence must support the conclusion that a party's total bargaining conduct demonstrates a failure or refusal to bargain in good faith or an intention to frustrate or avoid an agreement.[108] The Guild urges the Court to consider only the totality of its complaints, not the totality of all the bargaining sessions and all the actions on both sides. When the totality of the circumstances is properly considered, the County's actions do not add up to bad faith.

The Commission explained that "[w]hen many negotiation sessions have been held, looking at any one action or inaction by the parties in isolation cannot be the basis for a determination that a party breached its good faith bargaining obligations."[109] The Commission found here that under the totality of the circumstances, there was no bad faith bargaining by the Employer. In *Shelton School District,* the Commission explained the totality of the circumstances standard:

> [the employer] created a context of bad faith to such a degree that its position on specific items cannot be evaluated in isolation. A position taken by a party in a context of good faith bargaining may be perfectly lawful, while the same position if adopted as part of an

---

[107] *Walla Walla County*, Decision 2932-A; *City of Mercer Island*, Decision 1457 (PECB, 1982).
[108] *City of Clarkston*, Decision 3246 (PECB, 1989).
[109] AR 17.

> overall plan to frustrate agreement, and to penalize employees for trying to exercise their statutory right to bargain collectively, cannot be given agency imprimatur. Decision involving a failure to bargain in good faith reflects qualitative rather than a quantitative evaluation.[110]

The Commission further elaborated on the totality of the circumstances standard by explaining that it could be a "series of questionable acts which when examined as a whole demonstrate a lack of good faith bargaining."[111] Central to this standard is a finding that a party's overall intent is to frustrate agreement. It is not meant to be the sum of minor complaints to equal a violation, or as the Commission said in *Shelton,* it is qualitative, not quantitative.

Although the Guild attempted to shoehorn a series of minor unrelated Guild complaints into the category of "insufficient authority," the Commission properly found that the evidence does not support a finding that the Employer's representative lacked authority, or an intent by the Employer to frustrate agreement or delay bargaining. The facts establish overwhelmingly that the Employer's bargaining team "confer[ed] and negotiate[d]" in good faith, and effectively represented the employer in bargaining a successor contract. Clearly, the Employer's bargaining team did not bargain aimlessly without direction. While Mr.

---

[110] *Shelton School District,* Decision 579-B (PECB, 1984).
[111] *Snohomish County,* Decision 9834-B (PECB, 2008).

Conill had been directed to bargain the elimination of contractual overtime, after listening to the Guild's concerns about the different overtime provisions for non-represented employees, Mr. Conill returned to the table with a modified overtime proposal.

The Guild contends that the Employer's desire to compare the Guild's nondiscrimination proposal with the County's revised nondiscrimination policy and to consult with stakeholders regarding questions raised about the County's grievance procedures is evidence that the Employer's team lacked authority to bargain. But such review and consultation evidence a thoughtful, careful, prudent approach in light of the legal constraints inherent in public sector collective bargaining. The Guild did not present any evidence that the Employer's bargaining team did not follow through with responses to the Guild's questions and concerns. Neither party would be served if the County were to rush to tentative agreements which might conflict with laws, County policies, or exceed the bargaining team's authority, and it would only increase the risk of litigation.

Under the standards argued for by the Guild, the Employer could easily make a case that the Guild had an overall plan to frustrate bargaining. At the first meeting between the parties, Mr. Casillas said that the Employer was "nudging up against a ULP and you know, we'll just

take this to PERC-eeland because I always win in PERC-eeland."[112] The Guild did not make a counterproposal on the grievance procedure, and it refused to provide its own definition of "binding." The Guild also had to review proposals and check with the Guild membership who were not all at the table and the Guild refused to TA most of the Employer's proposals.[113] The Guild refused to discuss any other issue even though the parties had clearly reached a point of futility in the discussion on the grievance procedure on February 26, 2013.

The Guild inexplicably argues that the Commission did not properly apply the totality of the circumstances standard, yet also argues that the Commission improperly reviewed the entire record. In any case, the totality of the circumstances requires a review of the entire record which in this case, does not support a finding of bad faith or lack of authority. Bargaining proceeded as it often does, in fits and starts and not without frustration and anger on both sides. But bargaining did proceed and the Commission properly found that the Employer's representatives did not engage in bad faith bargaining.

---

[112]AR 413 (TR 200:20-22).
[113]AR 322-25 (TR 109-112).

VI. CONCLUSION

For the reasons stated above, the Employer requests that the Court affirm the Commission's decision. The Commission has the expertise and precedent to determine the fine line between bad faith and good faith bargaining. After a review of the record and according deference to the Hearing Examiner's findings, the Commission properly concluded that there was not substantial evidence to support the legal conclusion that the Employer bargained in bad faith by sending representatives to the bargaining table without sufficient authority.

Respectfully submitted this 22nd day of August, 2016.

TINA R. ROBINSON
Kitsap County Prosecuting Attorney

JACQUELYN M. AUFDERHEIDE; WSBA No. 17374
DEBORAH A. BOE; WSBA No. 39365
Deputy Prosecuting Attorneys
Attorneys for KITSAP COUNTY

CERTIFICATE OF SERVICE

I, Lesli S. Stidman-Carpenter, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On August 22, 2016, I caused to be served in the manner noted a copy of the foregoing document upon the following:

Christopher Casillas Cline & Casillas 520 Pike Street, Suite 1125 Seattle, WA 98101 [X] Via U.S. Mail [ ] Via Fax: [X] Via E-mail: ccasillas@clinelawfirm.com [ ] Via Hand Delivery	Mark S. Lyon Attorney General of Washington Government Operations Division 7141 Cleanwater Drive SW PO Box 40108 Olympia, WA 98504-0108 [X] Via U.S. Mail [ ] Via Fax: [X] Via E-mail: markl1@atg.wa.gov [ ] Via Hand Delivery

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED August 22, 2016, at Port Orchard, Washington.

Lesli S. Stidman-Carpenter,
Legal Assistant
Kitsap County Prosecutor's Office
614 Division Street, MS 35-A
Port Orchard, WA 98366
(360) 337-4271
lcarpent@co.kitsap.wa.us

APPENDIX A

COMPARISON OF HEARING EXAMINER AND COMMISSION FINDINGS OF FACTS

#	HEARING EXAMINER FINDING OF FACT	#	COMMISSION FINDINGS OF FACT
	(FINDINGS OF FACT 1-9 are identical)		
10	On October 9, 2012, the union also proposed minor changes to Article 16.1 – Nondiscrimination. The union asked that he parties tentatively agree to the issue. However, the employer did not do so because, as Kissler testified, "[t]hey had to go talk to somebody about the language, I assume their legal department, but I don't know who." Merringer testified that "[i]t's my recollection that [Conill} indicated that the [employer] was drafting basically a new definition or a new section on nondiscrimination, and he would like to take a look at that and bring that back for the group to consider to adopt."	10	On October 9, 2012, the parties discussed shift bidding, pat downs, and transportation. The union presented a full proposal, and the employer presented a second full proposal.
		14	The parties agreed to include a nondiscrimination article in the collective bargaining agreement but did not agree on language. Merringer's testimony on the discussion of the nondiscrimination language is more credible than Kissler's. The employer wanted to review the language: the employer was redrafting nondiscrimination language and Conill wanted to compare the proposed language with what the employer had been drafting.
		11	On November 6, 2012, the parties met. Conill provided the union with the employer's revised proposal on economic issues including medical benefits and wages. (new)
		12	On November 20. 2012, the parties met and discussed ground rules, on-calls, pat downs, bus transports, and a personnel issue. The employer provided the union a written position on the on-call issue. The employer explained its position during discussions. The parties were able to reach agreement on pat downs and bus transports. (new)
11	At the December 4, 2012, session, the parties covered several topics. First, they began discussing the grievance procedure. The union had concerns over the procedure terminating with the judges. The employer listened and, according to Kissler, "[t]hey understood our issues, but they really couldn't address them at the table. They – they had to take our proposal back to, I assume, the judges…" Merringer stated that he would talk to the judges about the union's concerns.	13	On December 4, 2012, the parties met and discussed nondiscrimination, the grievance procedure article, and overtime.

12	Also at the December 4, 2012 meeting, the union expressed concerns over the employer's proposal on overtime. It showed the employer team "Resolution No. 184 2012" which was adopted by the BOCC on November 26, 2012. It covered overtime for non-represented emplo9yees and amended the Kitsap County Personnel Manual. The resolution was contrary to what the employer proposed at the table to the union. When the resolution was presented, Kissler testified that the employer team "didn't know anything about this resolution and didn't have a response or an answer, and said they would have to check into it and get back with us in regards to that." After the employer team consulted with others, it presented a revised overtime proposal to the union a couple of meetings later. The revised proposal was similar to the terms contained in the resolution.	15	The union raised the BOCC overtime resolution at the December 4, 2012, meeting. Unaware of the resolution, Conill said he would have to look into it and get back to the union. As a result of the union raising the resolution as an issue, the employer changed its proposal.
13	On December 17, 2012, the parties met and again discussed the grievance procedure. Merringer stated that he had talked to the presiding judge about the union's comments that were made at the previous bargaining session about a possible lawsuit against the employer and superior court. In response, the presiding judge wanted to take the comments to the full board of KCSC judges.	17	On December 17, 2012, the parties met and discussed the grievance procedure. Merringer was scheduled to meet with all of the superior court judges on December 18, 2012, and told the union he would discuss the issue with them.
14	Merringer and the superior court judge met with the full board on December 18, 2012. The employer did not respond to the union regarding the issue until the next bargaining session.		
15	The parties' next bargaining session occurred on January 25, 2013, when the grievance procedure issue again was discussed. Merringer relayed a list of bulleted points of the judges' "[r]easons for not supporting arbitration" to the union team. Merringer stated that the presiding judge had emailed him an outline of the above reasons and that he reduced that email to a bulleted document to use as a "script." Although he presented the script as the employer's "rationale," Merringer testified that at the January 25, 2013 mee5ting his recollection was that Casillas's "only question was what binding meant, and if it would preclude [the union] from	18	At the January 25, 2013, meeting, both sides explained their grievance procedure proposals. The union asked what the word "binding" in the employer's proposal meant and if the language precluded the union from filing a lawsuit. Merringer asked Casillas to put the union's question in writing.

	filing for the lawsuit." Thus, Merringer responded to Casillas that the questions were legal in nature and asked Casillas to articulate them in writing so that he could obtain a legal opinion from the employer's legal counsel, Jacquelyn Aufderheide.		
THE FOLLOWING FINDINGS ARE IDENTICAL BUT RENUMBERED BY THE COMMISSION			
16		19	
17		20	
18		21	
19		22	
20		23	
21		24	
THE FOLLOWING FINDINGS ARE ALL RELATED TO THE FEBRUARY 26, 2013 BARGAINING SESSION			
22	The parties' final bargaining session occurred on February 26, 2013. The meeting was scheduled for 9:00A.M. until noon. The parties agreed to discuss the grievance procedure.	25	On February 26, 2013, the parties met. They discussed on-call employees, an unfair labor practice filed by the union, and the grievance procedure. The meeting ended abruptly after the discussion of the grievance procedure.
23	At the February 26, 2013 meeting, the parties quickly moved to the topic of the grievance procedure. Merringer read the same script to the union bargaining team that he had read to the team during the parties' January 25, 2013 meeting. In response, Casillas asked essentially the same questions noted above. Merringer stated that he had already answered the union's questions, and he restated his previous statement almost word for word. Casillas stated that it was a matter of fundamental fairness and that as far as he was aware all other represented groups in the county have binding arbitration. Merringer did not respond. Then, Casillas asked about the meaning of the word "binding." Merringer said that was a legal question he could not answer, but stated that the language meant Step 2 was the last step in the grievance procedure at the employer level. Casillas explained that the union was uncomfortable with the word "binding" because to most people it means something different and because of that a judge in the superior court may elect his or her own understanding of the word over the employer's legal counsel's	26	At the February 26, 2013, meeting, Casillas asked why the judge were uncomfortable with a grievance arbitration process. Merringer read from his prepared notes. Casillas told Merringer he was not answering the questions. Casillas asked the same question again. Merringer provided the same answer. They engaged in this exchange at least three times. The union contends the employer did not answer its questions. However, under cross-examination, Kissler testified that the employer later provided a detailed response explaining its rationale for the grievance proposal.

	interpretation. Casillas said that he did not understand why the employer's position was not to use arbitration, and that it was Merringer's responsibility to explain why so he could understand and make a proposal. Merringer responded that he had already answered Casillas's questions. Casillas asked Merringer how the judges could be impartial when as the employer they have a vested interests in the outcome. Merringer did not respond. Casillas asked again, and Merringer said he would agree that the judges are the employer.		
24	Kissler testified that Merringer became "clearly angry" during this exchange. Consequently, Merringer asked that the parties take a break. Casillas responded that Merringer did not get to unilaterally decide when the parties were done talking about a particular issue. Conill then suggested that the parties caucus for 15 minutes. Casillas agreed and stated that the parties could revisit the issue when they got back together.	27	At the meeting the union made "what if" proposals. Merringer asked the union to put forward a proposal for the employer to consider. Merringer's request indicates that, while the employer was taking a hard line on the grievance proposal, the employer would consider a more formal proposal.
25	During the break, Merringer consulted with the employer's legal counsel, who was not at the table, for direction on how to proceed. Merringer was told to move to a different agenda topic and "[i]f the [union] refused to move off of [sic] grievance and refused to move on to any other agenda items, to terminate or end the session." When Merringer returned, he demanded that the parties move to a different topic. When the union continued to want to discuss the grievance procedure, Merringer terminated the session, told Conill to set another date, and walked out of the bargaining session.	28	Merringer became frustrated with the discussion regarding the grievance procedure. Merringer requested a break, and the parties took a break. Merringer consulted legal counsel during the break.
		29	Upon returning from the break, Merringer told the union they "would beat the grievance process to death" and "were not going to make any headway." Merringer was willing to discuss any other topic on the agenda, but if the union was nt willing to move on, then he was finished negotiating for the day. The union wanted to continue to discuss the grievance proposal. Merringer told the union he was finished negotiating for the day and ended the meeting sometime between 10:00 and 11:00a.m. Merringer asked Conill to schedule a future meeting.
	THE FOLLOWING FINDING WAS NOT INCLUDED IN COMMISSION'S FINDINGS		
26	In a March 7, 2013 email from Merringer to Casillas, Merringer wrote that he believed Casillas was frustrating and obstructing		

KITSAP COUNTY PROSECUTOR

August 22, 2016 - 4:15 PM

Transmittal Letter

Document Uploaded: 4-487233-Response Brief.pdf

Case Name: Kitsap County Juvenile Detention Officers Guild v. Kitsap County
Court of Appeals Case Number: 48723-3

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Response__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Batrice K Fredsti - Email: bfredsti@co.kitsap.wa.us

A copy of this document has been emailed to the following addresses:

ccasillas@clinelawfirm.com
markl1@atg.wa.gov
jaufderh@co.kitsap.wa.us
dboe@co.kitsap.wa.us
kcpaciv@co.kitsap.wa.us

	bargaining and "taking advantage of being the only lawyer in the room, asserting your knowledge and expertise in the law, and demanding that we immediately respond to your legal contentions without benefit of legal counsel when we indicate that we will consult with the [employer's] attorney and get back to you."		